STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JOHNNY LEROY STANLEY,

Defendant-Appellant.

UNPUBLISHED
September 19, 2006

No. 245456
Oakland Circuit Court
LC No. 1999-166149-FC

Before: Murray, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for conspiracy to deliver or possess with intent to deliver 650 or more grams of a controlled substance, MCL 750.157a and MCL 333.7401(2)(a)(i),[1] possession with intent to deliver less than 50 grams of a controlled substance, MCL 333.7401(2)(a)(iv), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to consecutive prison terms of 30 to 60 years for the conspiracy conviction, one to 20 years for the possession with intent to deliver conviction, and two years for the felony-firearm conviction. We affirm.

I. Underlying Facts

Defendant's convictions arise from allegations that he engaged in a long-term drug trafficking conspiracy with Nathaniel Lee and Roderick Lee of the purported Lee family organization, and several others. During trial, several witnesses, including LaMark Northern and Eric Lee,[2] who is the nephew of Nathaniel and Roderick, testified extensively concerning their drug transactions with and involvement in the Lee organization. Several witnesses, including Northern and Lee also testified as to defendant's receipt (and distribution) of cocaine from members of the Lee family organization. Also, according to a police witness, in May 1993, defendant was a passenger in a stolen vehicle stopped by law enforcement officers. Drug records and cocaine residue were found in the vehicle.

[1] After the charged offense was committed, MCL 333.7401 was amended by 2002 PA 665 to reclassify the differentiation in the amounts of controlled substances.

[2] Because Eric was unavailable for trial, his preliminary examination testimony was admitted at trial.

In September 1998, search warrants were executed for numerous homes in the Pontiac area connected to the Lee family organization. Numerous individuals purportedly involved in the organization, including defendant, were subsequently arrested. In the home that defendant occupied, the police found 15 individually packaged rocks of cocaine next to a stove, one rock that had fallen by the stove, a scale next to the cocaine, a loaded .22 revolver, plastic baggies and corner ties, $1,000 under a couch, and $300 on defendant's person. There was evidence that, during the duration of the alleged drug trafficking conspiracy, defendant, as well as many of his alleged coconspirators, were not employed and did not file any tax returns from 1987 through 1998.

II. Admissibility of Eric Lee's Former Testimony

Defendant first argues that the trial court abused its discretion by admitting Eric Lee's preliminary examination testimony at trial under MRE 804(b)(1). Defendant asserts that the admission of this testimony violated his rights guaranteed by the Confrontation Clause of the United States and state constitutions.[3] We disagree.

A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). If there is an underlying question of law, such as whether admissibility is precluded by a rule of evidence, we review that question of law de novo. *McDaniel, supra*.

MRE 804(b)(1) governs the admission of former testimony if a witness is unavailable for trial. If the declarant is determined to be unavailable, MRE 804(b)(1) permits the declarant's "[t]estimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

Eric, who was involved in the drug trafficking, testified before a grand jury in April 1998, and gave critical evidence against defendant and the Lee family organization. He also testified at the preliminary examinations for defendant and other coconspirators. Eric subsequently testified at Nathaniel Lee's preliminary examination in May 2000, but claimed that he could not recall any details about the alleged drug trafficking conspiracy or his former testimony. At defendant's 2002 trial, outside the presence of the jury, Eric, who was represented by counsel, invoked his Fifth Amendment privilege not to testify,[4] which the trial court accepted. As a result, the court concluded that Eric was "unavailable" under MRE 804(a) and admitted Eric's preliminary examination testimony.

Defendant's only argument with respect to the admissibility is that he was not afforded an adequate opportunity to cross-examine Eric under a similar motive. MRE 804(b)(1). Whether a

[3] US Const, Am VI; Const 1963, art 1, § 20.

[4] US Const, Am V; see also Const 1963, art 1, § 17.

party had a similar motive to develop the witness's testimony depends on the similarity of the issues for which the testimony was presented at each proceeding. *People v Vera*, 153 Mich App 411, 415; 395 NW2d 339 (1986). Here, defendant's motive was similar. Eric's prior testimony was principally offered to prove defendant's participation in a drug trafficking conspiracy. His preliminary examination testimony was introduced at trial for the same purpose. At the preliminary examination, defense counsel, along with the codefendants' attorneys, cross-examined Eric at length in an effort to show that the defendants were not involved in the drug trafficking conspiracy, and to demonstrate that Eric was not credible.

Moreover, defendant offers no specific examples of additional questions that he was not able to pursue because of either Eric's absence at trial or the court's handling of the prosecutor's objections at the preliminary examination. Finally, because MRE 804(b)(1) is a firmly rooted hearsay exception, evidence admitted under the exception does not deprive a defendant of his constitutional right of confrontation. *People v Meredith*, 459 Mich 62, 69-71; 586 NW2d 538 (1998). Thus, the trial court did not abuse its discretion by concluding that Eric's preliminary examination testimony was admissible at trial under MRE 804(b)(1).

III. Other Acts Evidence

Next, defendant argues that he was denied a fair trial by the admission of evidence regarding the drug activities of other individuals when he was in no way linked to these acts.[5] Defendant argues that this evidence was irrelevant and prejudicial. We disagree.

Generally, all relevant evidence is admissible at trial. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. MRE 401. Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point. *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). But even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403.

MRE 404(b) prohibits "evidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime. MRE 404(b)(1); see also *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Other acts evidence may be admissible, however, "for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material." MRE 404(b)(1). Other acts evidence is admissible under MRE 404(b) if it is offered for a proper purpose, is relevant to an issue or fact of consequence at trial, and is sufficiently probative to outweigh the danger of unfair prejudice under MRE 403. *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 55, 63-64, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). In application, the admissibility of

[5] Defendant raised this issue in a pretrial motion, which the court summarily denied and in a motion for a mistrial, which the court summarily denied.

evidence under MRE 404(b) necessarily hinges on the relationship of the elements of the charge, the theories of admissibility, and the defenses asserted. *VanderVliet, supra* at 75.

Here, the record demonstrates that the challenged evidence was not offered to show that defendant had a bad character. Rather, the evidence was probative of defendant's intent, and common scheme, plan, or system for trafficking cocaine, and to assist the jury in weighing the witnesses' credibility. Particularly, it was the prosecution's theory that defendant was involved in a long-term drug trafficking conspiracy with Nathaniel Lee and Roderick Lee of the Lee family organization, and others. Although some of the drug transactions did not involve defendant, they were relevant to show the existence and scope of a conspiracy between defendant and numerous other individuals to distribute large quantities of cocaine. The fact that defendant was not directly linked to or aware of each drug transaction involving each person is inconsequential. It is not "necessary that one conspirator should know all of the conspirators or participate in all of the objects of the conspiracy." *People v Meredith (On Remand)*, 209 Mich App 403, 411-412; 531 NW2d 749 (1995) (citation omitted).

Moreover, during trial, the court cautioned the jury to make a decision regarding whether the acts could be attributed to defendant. In its preliminary and final instructions, the trial court instructed the jury that "defendant is not responsible for the acts of other members of the conspiracy unless those acts are part of the agreement or further the purposes of the agreement," and that each defendant is entitled to have his guilt decided individually. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Therefore, this issue does not warrant reversal.

IV. Sufficiency of the Evidence

Defendant next argues that the evidence was insufficient to sustain his conviction because there was no evidence that he conspired, or had an agreement with anyone, specifically the other named defendants, to possess and intend to deliver cocaine exceeding 650 grams. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514. All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

To support a conviction for conspiracy to deliver a controlled substance, the prosecution must prove that:

(1) the defendant possessed the specific intent to deliver the statutory minimum as charged; (2) his coconspirators possessed the specific intent to deliver the statutory minimum as charged; and (3) the defendant and his coconspirators possessed the specific intent to combine to deliver the statutory minimum as charged to a third person. [*People v Mass*, 464 Mich 615, 629-630, 633; 628 NW2d 540 (2001), citing *People v Justice (After Remand)*, 454 Mich 334, 349; 562 NW2d 652 (1997).]

A conspiracy is a voluntary, express or implied mutual agreement or understanding between two or more persons to commit a criminal act or to accomplish a legal act by unlawful means. *People v Blume*, 443 Mich 476, 481, 485; 505 NW2d 843 (1993); *People v Cotton*, 191 Mich App 377, 392-393; 478 NW2d 681 (1991). For intent to exist, the defendant must know of the conspiracy, know of the objective of the conspiracy, and intend to participate cooperatively to further that objective. *Blume, supra* at 485. Direct proof of a conspiracy is not essential; rather, proof may be derived from the circumstances, acts, and conduct of the parties, and inferences may be made because such evidence sheds light on the coconspirators' intentions. *Justice (After Remand), supra* at 347; *Cotton, supra*.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to conclude that the elements of conspiracy were proven beyond a reasonable doubt. The evidence, if believed, indicated that Roderick and Nathaniel Lee led a drug trafficking organization, which included defendant, and that defendant knowingly cooperated with other members of the Lee family organization to further a drug trafficking scheme to possess and deliver numerous kilograms of cocaine. There was evidence that defendant was regularly at Roderick's house throughout the 1990s, and lived in a house owned by Roderick. There was evidence that Nathaniel and Roderick received several kilograms of cocaine, which they distributed to third parties, including defendant. Eric Lee, an admitted member of the organization, testified that, on several occasions, defendant advised him that he was supplied by Roderick, and also indicated that he "sold" for him. Eric also testified to discussing with defendant how defendant had "messed up" 24 ounces of cocaine that was related to Roderick. Additional testimony was given that Roderick indicated to LeMark Northern that he could make more money by fronting cocaine to defendant rather than selling it to Northern.

Additionally, in May 1993, defendant was in a stolen vehicle with Laws, and drug records and cocaine residue were found in the vehicle. In September 1998, the police executed a search warrant at defendant's residence and found 16 rocks of cocaine, a scale, drug packaging material, a fully loaded weapon, and $1,300. There was also evidence that defendant was not employed during the alleged duration of the drug trafficking conspiracy. In sum, viewed in a light most favorable to the prosecution, the evidence was sufficient to sustain defendant's conviction of conspiracy to deliver or possess with intent to deliver 650 or more grams of a controlled substance.

V. Effective Assistance of Counsel

Next, defendant argues that defense counsel was ineffective for failing to move for severance. We disagree.

Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing norms and that the

representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

In general, a defendant does not have a right to a separate trial. *People v Hurst*, 396 Mich 1, 6; 238 NW2d 6 (1976). Indeed, a strong policy favors joint trials in the interests of justice, judicial economy, and administration. *People v Etheridge*, 196 Mich App 43, 52; 492 NW2d 490 (1992). Severance is mandated under MCR 6.121(C) only when a defendant demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. *People v Hana*, 447 Mich 325, 345; 524 NW2d 682 (1994). In order to make this showing, a defendant must provide the court with a supporting affidavit, or make an offer of proof, that "clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *Id.* at 346. Mere inconsistency of defenses is not enough to require severance; the defenses must be mutually exclusive or irreconcilable. *Id.* at 349. "Incidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice." *Id.* (citation omitted). In sum, severance should be granted "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at 359-360 (internal citation omitted).

Defendant's and Louis Laws's joint trial involved numerous witnesses and substantially identical evidence. To hold separate trials in these substantially identical cases would have been unnecessarily duplicative and excessive. The interests of justice, judicial economy, and orderly administration clearly called for a joint trial. Further, defendant does not provide any concrete facts or reasons to justify separating the proceeding, and has failed to persuasively demonstrate that his substantial rights were prejudiced. Neither defendant pointed the finger at the other during trial. Further, the jury did not have to believe one defendant at the expense of the other and, in fact, it did not. Defendant and Laws were each convicted of conspiracy. Finally, the trial court instructed the jurors concerning reasonable doubt and the determination of guilt or innocence on an individual basis, and cautioned the jury that each case had to be considered and decided separately and on the evidence as it applied to each defendant. The risk of prejudice from a joint trial may be allayed by a proper cautionary instruction. *Id.* at 351, 356.

Because defendant has failed to show that he was entitled to severance, he has likewise failed to establish that he was prejudiced by defense counsel's failure to move for severance. *Effinger*, *supra*. Consequently, defendant is not entitled to a new trial on this basis.

VI. Defendant's Standard 4 Brief

A. Grand Jury Indictment

In a supplemental brief filed in propria persona, defendant first argues that the trial court abused its discretion by granting the prosecution's motion to amend the indictment to add the charges of possession with intent to deliver less than 50 grams of a controlled substance and felony-firearm. We disagree.

In September 1998, the grand jury indicted defendant on conspiracy to deliver or possess with intent to deliver 650 or more grams of a controlled substance. On October 8, 1998, an amended grand jury indictment was filed that added the two additional charges. Defendant

thereafter had a preliminary examination, at the conclusion of which defendant was bound over only on the conspiracy charge. Subsequently, the trial court granted defendant's motion to quash the conspiracy charge. This Court thereafter reversed the trial court's decision in an unpublished opinion per curiam, issued April 20, 2001 (Docket No. 223373). The Supreme Court then denied defendant's application for leave to appeal in an order in which it stated that, pursuant to *People v Glass (After Remand)*, 464 Mich 266; 627 NW2d 261 (2001), the grand jury indictment rendered moot any complaints about the preliminary examination. See *People v Stanley*, 465 Mich 911; 638 NW2d 747 (2001). After the grand jury indictment was reinstated, defendant moved to quash the first amended indictment. Relying on *Glass, supra*, the trial court found that the Supreme Court had rejected defendant's argument. In April 2002, defendant's first trial began, and ended in a mistrial. After the second trial, defendant was convicted of all three counts.

Defendant now claims that the amended grand jury indictment was invalid because the prosecution failed to go back to the grand jury to effectuate the amendment. But the record shows that the grand jury issued an amendment on October 8, 1998, which was unsealed on October 9, 1998. Further, we reject defendant's claim that the trial court impermissibly added the two counts dismissed at the preliminary examination by the district court. The trial court correctly found that because the grand jury had indicted defendant on possession with intent to deliver less than 50 grams of cocaine and felony-firearm, the district court was without authority to dismiss the charges. See *Glass, supra* at 271 (the right to a preliminary examination does not apply if a defendant is indicted by a grand jury). "This case stands filed in the circuit court on the grand jury indictment." *Id.* at 283.

We also reject defendant's claim that the prosecution abused its discretion by charging defendant with possession with intent to deliver less than 50 grams of cocaine, and felony-firearm. "[T]he decision whether to bring a charge and what charge to bring lies in the discretion of the prosecutor." *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998). The prosecutor has broad discretion to bring any charge supported by the evidence. *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). A prosecutor abuses his discretion only if "a choice is made for reasons that are 'unconstitutional, illegal, or ultra vires.'" *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996), quoting *People v Morrow*, 214 Mich App 158, 161; 542 NW2d 324 (1995).

Defendant does not offer any information or evidence to support that the charges were brought for an unconstitutional, illegal, or illegitimate reason, so there is no basis for this Court to conclude that the prosecutor abused his power in charging defendant with possession with intent to deliver less than 50 grams of cocaine and felony-firearm. Furthermore, the evidence showed that when the police executed the search warrant at defendant's residence, the police found 16 individually packaged rocks of cocaine, a scale next to the cocaine, and a loaded .22 revolver. These facts supported the charges of possession with intent to deliver less than 50 grams of cocaine and felony-firearm.

Defendant further claims that the prosecutor was being vindictive by amending the grand jury indictment and then offering him a plea to those charges. But apart from his general claim, defendant has failed to provide any persuasive authority that there is prohibition against offering a defendant a plea under these circumstances. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *People v*

Leonard, 224 Mich App 569, 588; 569 NW2d 663 (1997). Consequently, we reject this claim of error.

We also reject defendant's related argument that he was denied the effective assistance of counsel because defense counsel waived his preliminary hearing after the amended grand jury indictment was reinstated. Defendant was tried on a grand jury indictment. Before our Supreme Court decided *Glass*, *supra*, an indictment by a grand jury did not restrict a magistrate's bindover following a preliminary examination. See *People v Baugh (On Remand)*, 249 Mich App 125, 126; 641 NW2d 283 (2002). In *Glass*, *supra* at 129, the Court held that a defendant did not have a right to a preliminary examination if the defendant was indicted by a grand jury. Consequently, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different. *Effinger*, *supra.*

B. Perjured Testimony

Defendant next claims the prosecution allowed the "perjured testimony" from Eric Lee and LaMark Northern to remain uncorrected. Defendant contends that the witnesses' testimony before the Oakland County grand jury in this case, and before a federal grand jury in a federal drug case (involving a different defendant) was inconsistent and that either a new trial or a remand is warranted as a result. We disagree.

The prosecution has a constitutional duty to report the false testimony of its witnesses and may not knowingly use false testimony to obtain a conviction. *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). Absent proof that the prosecution knew that the trial testimony was false, however, reversal is unwarranted. *People v Herndon*, 246 Mich App 371, 417-418; 633 NW2d 376 (2001). Additionally, even if the prosecution failed to correct false testimony, automatic reversal is not required. *Lester*, *supra* at 280. Rather, a new trial is required only if there is a reasonable likelihood that the false testimony could have affected the verdict. *Id.*

We initially note that defendant has failed to present on appeal the inconsistent testimony from the federal grand jury and the Oakland County grand jury. But even if we were to accept defendant's claim regarding the alleged discrepancies, reversal is not required because it is highly unlikely that the testimony in question affected the verdict. With regard to Northern, he agreed that at one point when previously testifying in front of a federal grand jury, he discussed the breakdown of a cocaine deal between himself, Joe Abraham, Willie Adams, Demar Garvin, Marvin Smith, and Demark Anthony. The prosecution brought out that, when previously testifying, Northern testified to a more specific breakdown, including the fact that drugs also went to Roderick, Nathaniel, and Larry McGee. Given the fact that this testimony did not directly relate to defendant and considering the other evidence against defendant, there is no reasonable likelihood that any discrepancy affected the outcome of the trial.

With regard to Eric, defense counsel cross-examined him regarding a purported statement that he made to an agent indicating that the Lee organization did not front drugs. Eric denied making the statement, indicated that the statement was not correct, and reiterated that the organization did front drugs. Defense counsel did not cross-examine the agent regarding the alleged statement. Consequently, there has been no showing that Eric's testimony was actually false. Also, the jury was aware of the purported inconsistent statement. Moreover, there is no evidence, beyond mere speculation, that the prosecutor sought to present false testimony, or

conceal the alleged inconsistencies. Because there is no tangible indication that the prosecutor engaged in any misconduct or that the evidence could have affected the verdict, we reject this claim of error.

We also reject defendant's related argument that he was denied the effective assistance of counsel because defense counsel failed to correct Eric's and Northern's allegedly perjured testimony. As previously indicated, defendant has failed to provide record support for his claim that the witnesses actually perjured themselves. Without any information regarding the exculpatory value of the allegedly conflicting testimony, defendant cannot prove that defense counsel was ineffective in this regard. "Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001) (citation omitted). Moreover, there is no allegation or indication that defense counsel was unaware of the federal grand jury proceedings, as opposed to choosing not to discuss it. Counsel's decisions concerning what questions to ask, and what evidence to present are presumed to be matters of trial strategy, which this Court will not evaluate with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The record discloses the defense presented an adequate attack on Northern's and Eric's credibility. For these reasons, we reject this claim of error.

C. Newly Discovered Evidence

We next address defendant's claim that he is entitled to a new trial on the basis of Eric's statement indicating that he lied about his uncles' involvement in drug trafficking. Because defendant failed to raise this issue below, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In order to merit a new trial based on newly discovered evidence, a defendant must demonstrate that: (1) the evidence itself, not merely its materiality, is newly discovered; (2) the newly discovered evidence is not merely cumulative; (3) the defendant, exercising reasonable diligence, could not have discovered and produced the evidence at trial; and, (4) the new evidence makes a different result probable on retrial. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (citation omitted).

Here, Eric's recantation statement cannot be considered newly discovered. As previously indicated, at Nathaniel's May 2000 preliminary examination, Eric claimed that he could not recall any details about the alleged drug trafficking conspiracy. Eric testified that he did not recall any incidents related to drug trafficking, and did not recall any of his grand jury testimony. Eric even denied any memory of ordinary facts, such as his previous address. Consequently, Eric's recantation is not "newly discovered."

Furthermore, even if Eric's recantation could be considered newly discovered, new evidence in the form of a witness' recantation testimony has traditionally been regarded as suspect and untrustworthy. *People v Barbara*, 400 Mich 352, 362-363; 255 NW2d 171 (1977) (citations omitted). This Court has repeatedly expressed reluctance to grant new trials on the basis of such evidence. *People v Canter*, 197 Mich App 550, 560; 496 NW2d 336 (1992). Consequently, we reject his claim of error.

D. Transcripts

Next, defendant claims that his due process rights were violated because he was denied his right to a complete record of the pretrial proceedings. We disagree. The unavailability of a transcript does not automatically require the vacation of a defendant's conviction. We must determine whether the unavailability of those portions of the trial transcript so impedes the defendant's right to appeal that a new trial must be ordered. *People v Audison*, 126 Mich App 829, 834-835; 338 NW2d 235 (1983). The defendant bears the burden of demonstrating prejudice resulting from missing transcripts. *Bransford v Brown*, 806 F2d 83, 86 (CA 6, 1986). "A defendant's constitutional right to appeal is satisfied if the surviving record is sufficient to allow evaluation of the issues on appeal. Whether the record is sufficient depends upon the question asked of it." *Elazier v Detroit Non-Profit Housing Corp*, 158 Mich App 247, 249-250; 404 NW2d 233 (1987).

Defendant first challenges the absence of a February 27, 2002, pretrial transcript. According to the lower court docket listings, a pretrial hearing was held on February 27, 2002. On March 2, 2004, defendant ordered a transcript of proceedings held on that date. On May 6, 2004, the court reporter indicated that there were no proceedings that occurred on February 27, 2002. On February 23, 2005, the court entered an order directing that a "Corrected Docket Entry Sheet" be prepared to "[d]elete entry showing that a pretrial was held on 2/27/02, as the Court has certified there was no pretrial on that date." Defendant claims that the court reporter is incorrect, and that there were arguments on that date regarding the prosecutor's motion to amend the grand jury indictment. The record shows that a hearing concerning that same matter occurred on July 24, 2002. Even if defendant could adequately rebut the court reporter's claim that no proceedings occurred on February 27, 2002, defendant has failed to persuasively argue how the absence of any arguments allegedly made on February 27, 2002, impeded his constitutional right to appeal where the same matter was addressed at the transcribed hearing in July 2002, and the existing record shows no additional amendment of the grand jury indictment after October 1998. *Elazier*, *supra*. Thus, this claim is without merit.

We also reject defendant's request for audiotapes of proceedings that occurred in April 2002, to establish the true and accurate account of the proceeding.[6] Trial transcripts are presumed accurate. *People v Abdella*, 200 Mich App 473, 475; 505 NW2d 18 (1993). "Where a defendant is able to make a colorable showing that inaccuracies in transcription have adversely affected the ability to secure postconviction relief, and such matters have seasonably been brought to the trial court's attention, the defendant is entitled to a remedy." *Id.* at 475-476.

Here, defendant makes no persuasive argument as to how, if the transcripts contained the comments he asserts are missing, his ability to seek postconviction relief would actually be enhanced. *Id.* at 476. Appellate relief is thus not warranted under the circumstances.

[6] Defendant contends that, during the hearings, the trial court threatened Eric Lee, causing him not to testify.

E. *Brady* Violation

Defendant next claims that he is entitled to an in-camera hearing and a new trial because the prosecutor withheld federal officers' investigative reports or notes prepared in a federal drug case that may be material in this case, thereby violating the rule set forth in *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). We disagree.

A criminal defendant has a due process right of access to information possessed by the prosecution. *Lester, supra* 232 Mich App at 280, citing *Brady, supra.* In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence and could not have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *Lester*, *supra* at 281-282.

Initially, we note that defendant has failed to proffer the alleged reports or notes prepared by federal officers. Additionally, defendant does not indicate which reports or notes the prosecution withheld. In fact, the record shows that the prosecution provided reports to defendant from federal officers, and defendant has not indicated which reports he was missing at the time of trial. Defendant must provide a factual basis to sustain his position. *Traylor*, *supra*. More compelling, however, is that defendant argues that reports or notes were withheld, but does not assert that the information was favorable to him. Although defendant speculates and makes general observations concerning how the receipt of the information may have affected the outcome of his case, he makes no specific claims regarding the *actual* effect. Appellate relief is not warranted on this basis.

F. Search Warrant Affidavit

Next, defendant claims that he is entitled to an evidentiary hearing pursuant to *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978), to determine the validity of the search warrant affidavit, alleging that ATF Agent Jerome Shape used perjured statements in the affidavit used to procure the search warrant to search defendant's residence. We disagree.

There is a presumption of validity with respect to the affidavit supporting a search warrant. *People v Turner*, 155 Mich App 222, 226; 399 NW2d 477 (1986); *Franks, supra.* In *Franks*, *supra* at 171-172, the United States Supreme Court delineated the standard for holding an evidentiary hearing when an affidavit is challenged:

> To mandate an evidentiary hearing, the challenger's attack *must be more than conclusory and must be supported by more than a mere desire to cross examine.* There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. *They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained.* Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or

reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. [Emphasis added.]

"The defendant has the burden of showing, by a preponderance of the evidence, that the affiant knowingly and intentionally, or with a reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to the finding of probable cause." *People v Ulman*, 244 Mich App 500, 510; 625 NW2d 429 (2001).

Defendant failed to make a substantial preliminary showing that the agent intentionally, or with reckless disregard for the truth, made a false statement or material omission in his affidavit in support of the search warrant. Not only has defendant failed to provide the search warrant affidavit or the warrant, he does not indicate which statements in the affidavit were purportedly false, and he has not submitted any affidavits or statements indicating that the officer knew that any information he was providing in the affidavit was false. Although defendant claims that the agent would have known that certain grand jury testimony of Eric and Northern was perjured, defendant has not submitted the purportedly conflicting testimony. Nor has defendant shown that if the purportedly incorrect statements were excluded from the affidavit, there would have been no probable cause for issuance of the search warrant. Simply put, defendant has not overcome the presumption of validity with respect to the affidavit supporting the search warrant. Therefore, remand for a *Franks* hearing is not warranted.

Affirmed.

/s/ Christopher M. Murray
/s/ Michael R. Smolenski
/s/ Deborah A. Servitto